No. 78-1192

In the Supreme Court of the United States

OCTOBER TERM, 1978

GINSBURG, FELDMAN & BRESS, PETITIONER

v.

DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 13a-19a), the panel opinion of the court of appeals (Pet. App. 20a-98a), and the order of the court of appeals vacating the panel opinion and granting rehearing en banc (Pet. App. 99a) are unreported.

JURISDICTION

The judgment of the court of appeals en banc (Pet. App. 100a-101a) was entered on October 31, 1978. The petition for a writ of certiorari was filed on January 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether portions of a Department of Energy manual, setting forth guidelines for auditing oil companies'

compliance with energy regulations, are exempt from disclosure under the Freedom of Information Act.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in relevant part:

> (a)(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
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> * * * * *
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> (C) administrative staff manuals and instructions to staff that affect a member of the public;
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> * * * * *
>
> (b) This [Act] does not apply to matters that are—
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> * * * * *
>
> (2) related solely to the internal personnel rules and practices of an agency;
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> * * * * *

STATEMENT

The Department of Energy is responsible for auditing the records of petroleum refiners to determine whether the refiners have complied with civil and criminal provisions of the federal energy laws, including mandatory petroleum price regulations. Petitioner is a law firm that represents a number of refiners subject to these audits.

On January 24, 1975, petitioner requested access under the Freedom of Information Act, 5 U.S.C. 552, to the following documents of the Federal Energy Administration (Pet. App. 102a):[1]

> Any and all manuals, instructions, memoranda, guidelines, training materials, reporters, booklets, and other documents utilized by the FEA to train, instruct, direct, guide, or supervise refinery auditors in the performance of their duties, including but not limited to, the manner in which such audits are to be conducted and the time frame, if any, within [which] such audits are to be completed.

[1]The Department of Energy is now responsible for FEA's former auditing responsibilities. See Pet. 3 n.1.

In response, FEA identified three documents falling within petitioner's request: an instruction manual for refinery auditors, which "explains the FEA's somewhat complex Mandatory Petroleum Price Regulations in detail and contains examples and selected problems to aid in the understanding of those regulations" (*id.* at 105a), and two sets of guidelines (the "Refinery Audit Review Field Audit Guidelines" and the "Guidelines for Audit Modules"), which "indicate the comprehensiveness of an audit and the degree to which audited material should be verified" (*id.* at 107a). Although FEA decided to release the Manual to petitioner, it concluded that the Guidelines are exempt from disclosure because they "would enable a violator to violate the law and escape detection" and hence would undermine the effectiveness of "the relatively new and evolving FEA compliance program" (*id.* at 108a). FEA explained that a refiner subject to an FEA audit, if given access to the Guidelines, "would * * * be able to ascertain the areas of the Mandatory Petroleum Price Regulations that are not subject to audit, those which are subject only to cursory review, and those which are subject to detailed examination by the FEA's refinery auditors" (*id.* at 107a).

Petitioner then instituted this action in the United States District Court for the District of Columbia, seeking access to the Guidelines. After reviewing the disputed documents *in camera*, the district court held that they are largely exempt under Exemption 2 of the Act, 5 U.S.C. 552(b)(2), which relates to "internal personnel rules and practices of an

agency" (Pet. App. 15a, 18a). The court found that the Guidelines contain the agency's "enforcement 'game plan' " and concluded that public knowledge of the Guidelines would be "useful only for the purpose of evading regulation" (*id.* at 17a). The court explained (*id.* at 14a; footnote omitted):

> The applicable [federal oil pricing] regulations * * * are complex and far-reaching. Consequently, FEA auditors cannot possibly check each entry and computation necessary to determine whether refiners have complied with the regulations in full, but must rely on spot checks, random sampling, and analysis of selected key figures.* * * [A]ccording to [affidavits filed by defendants], knowledge of [the Guidelines'] contents by refiners could result in the concealment of illegal conduct.

A panel of the court of appeals affirmed on the basis of Exemption 2 (Pet. App. 50a). The entire court of appeals vacated the panel's decision and ordered the case consolidated for rehearing en banc with *Jordan* v. *United States Department of Justice*, No. 77-1240 (D.C. Cir.), a case involving an FOIA request for an internal manual of the United States Attorney's office setting forth guidelines for the exercise of prosecutorial discretion (Pet. App. 99a). Subsequently, the en banc court, while ordering disclosure in *Jordan*, affirmed the district court's order in the present case by an equally divided court (*id.* at 100a-101a).[2]

ARGUMENT

The district court correctly held that the FEA audit guidelines are exempt from disclosure under the Freedom of Information Act. As the court noted, public disclosure of the Guidelines would result in substantial harm to FEA's law enforcement interests and would be "useful only for the

[2]Judge Leventhal recused himself in this case because of a prior association with petitioner.

purpose of evading regulation" (Pet. App. 17a). Every court to have confronted this issue under the FOIA has reached the same result: while the theories the courts invoke vary, no court has ordered the release of investigatory manuals in circumstances where public knowledge of administrative procedures or standards would allow the circumvention of agency regulation. Moreover, even if the lower courts were in dispute concerning public access to law enforcement manuals, this would be an inappropriate case in which to resolve the conflict: the district court's judgment was affirmed without opinion by an equally divided court, and petitioner concedes (Pet. 10) that the reasons relied on to support nondisclosure by the four judges who voted to affirm are uncertain.

1. Petitioner contends (Pet. 8-9) that the Court should grant review because there is an inconsistency in the legislative history concerning the proper interpretation of Exemption 2. It notes that the House Report observed that the exemption would protect "guidelines and manuals of procedures for Government investigators, or examiners" (H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. 10 (1966)), while the Senate Report viewed the exemption as covering only trivial "housekeeping" matters such as "use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like" (S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)).

As this Court suggested in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), however, the two reports are not wholly inconsistent even though they have different emphases. While regarding the Senate Report as generally the more authoritative, the Court has observed that only the House Report focused on the precise problem of public access to law enforcement materials. *Id.* at 366-367. Accordingly, the Court has qualified its endorsement of the Senate Report in law enforcement cases (*Department of the Air Force* v. *Rose, supra*, 425 U.S. at 369; emphasis added):

> In sum, we think that, *at least where the situation is not one where disclosure may risk circumvention of agency regulation,* Exemption 2 is not applicable to matters subject to such a genuine and significant public interest.

See also *id.* at 364.

Moreover, it is not accurate to say that the Senate Report reflects no concern for the need to preserve the confidentiality of law enforcement manuals. The Senate committee agreed with the House committee that there is such a need. In explaining why such manuals were excluded from the disclosure, indexing, and reading room requirements of Section 552(a)(2)(C), the Senate committee stated:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters *rather than to law enforcement matters* protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.

S. Rep. No. 813, *supra*, at 2 (emphasis added). In light of this language, it is fair to conclude that the Senate committee, like the House committee, believed that law enforcement manuals should be held in confidence. Indeed, it would make little sense for Congress to provide that law enforcement manuals should not be routinely disclosable to the public under Section 552(a)(2) because of the legitimate need to keep investigatory strategy and techniques

confidential and at the same time to require the material disclosed upon request under Section 552(a)(3). See K.C. Davis, *Administrative Law Treatise* 56 (Supp. 1976).[3]

2. Petitioner's statement that this case presents "significant conflicts" with the decisions of other courts (Pet. 10) is incorrect. To begin with, as we pointed out above, the court of appeals affirmed *ex necessitate*, without opinion. The D.C. Circuit's interpretation of the FOIA therefore cannot be said with assurance to be at odds with the judgment of any other circuit.

More important, although there may be differences in approach among the courts of appeals, no court of appeals has ordered the release of law enforcement guidelines like those involved here. For example, the Second Circuit in *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F. 2d 544 (1978), sustained nondisclosure of BATF's "Raids and Searches" manual on the basis of Exemption 2, while the Eighth Circuit in similar situations has relied on the limited scope of Section 552(a)(2)(C) as the justification for confidentiality. *Cox* v. *United States Department of Justice*, 576 F. 2d 1302 (1978) (DEA Agents Manual and violator classification identifier); *Cox* v. *Levi*, No. 77-1213 (8th Cir. Feb. 13, 1979) (FBI Manual of Instructions). Other courts, while ordering disclosure of documents whose release was not likely to hinder agency regulation, have expressly endorsed the principle that internal guidelines that would substantially harm law enforcement

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[3]Since the enactment of the FOIA, both Houses of Congress have again expressed their determination that law enforcement techniques should remain confidential. Exemption 7(E) of the statute, which was added in 1974, provides that records gathered during a law enforcement investigation may be withheld if they would "disclose investigative techniques and procedures." It would be odd if investigative officials could withhold otherwise-disclosable records simply because clever persons could deduce law enforcement procedures, while the same law enforcement officials would be required to disclose on demand manuals spelling out the same procedures.

need not be divulged. See *Stokes* v. *Brennan*, 476 F. 2d 699, 701 (5th Cir. 1973); *Hawkes* v. *IRS*, 467 F. 2d 787, 794-795 (6th Cir. 1972), appeal after remand, 507 F. 2d 481 (6th Cir. 1974). See also *Chamberlain* v. *Alexander*, 419 F. Supp. 235 (S.D. Ala. 1976); *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D. D.C. 1972), remanded on other grounds, 484 F. 2d 1086 (D.C. Cir. 1973); *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971).

The D.C. Circuit's holding in *Jordan* v. *U.S. Department of Justice*, No. 77-1240 (Oct. 31, 1978) (en banc), is not inconsistent with the results of these cases. *Jordan* involved the charging manuals, rules and guidelines used by the United States Attorney for the District of Columbia in deciding which persons should be prosecuted for suspected violations of the law and the manner in which prosecutorial discretion should be exercised. Since the guidelines came into play only after arrest, there was little danger that disclosure of the documents would enable potential lawbreakers to circumvent the law. Hence, this case is in sharp contrast to *Jordan*, because (as the district court found and petitioner does not seriously dispute) disclosure of the FEA Guidelines *would* enable violators of oil price regulations to escape detection altogether.[4] Indeed, in the first case in the District of Columbia to consider the issue after *Jordan*, the district court followed the Second Circuit's decision in *Caplan* and sustained nondisclosure of the

[4]Judge Leventhal concurred in the result in *Jordan* because he considered the case to be one "of substantial public interest in disclosure that is not offset by an interest in preventing circumvention of law or regulations" (slip op. 5). In Judge Leventhal's view, "Exemption 2 is applicable where the document consists of internal instructions to such government officials as investigators and bank examiners. In such a case disclosure would permit circumvention of the law, and there is no substantial, valid external interest of the community at large in revelation" (*id.* at 3). This statement strongly suggests that Judge Leventhal, if he had not recused himself in this case, would have voted to affirm the district court's nondisclosure order.

Secret Service Manual under Exemption 2, distinguishing *Jordan* on its facts. *Sturgeon* v. *Department of Treasury*, Civ. No. 77-1961 (D. D.C. Jan. 3, 1979).

Whatever differences there are among the courts of appeals in the rationale for nondisclosure of law enforcement manuals may be clarified by the courts in pending cases. See, *e.g.*, *Sladek* v. *Bensinger*, No. 77-3247 (5th Cir. argued Nov. 8, 1978) (DEA Agents Manual); *Cox* v. *U.S. Department of Justice*, No. 78-2267 (D.C. Cir. docketed Dec. 14, 1978) (Marshal's Service Manual). In view of the current consensus on result, however, the issue does not warrant review by the Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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